CRIMINAL APPEAL.

Before Mr. Justice Macpherson and Mr. Justice Trevelyan.

THE GOVERNMENT OF BENGAL *v.* UMESH CHUNDER MITTER AND OTHERS.*

1888
November 6.

Attempt to commit offence—Attempt to cheat—Currency Office—Application for payment of lost halves of Currency Notes.

A man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is therefore not cheated. *R.* v. *Hensler* (1) referred to.

M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office, having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves and that the notes had been withdrawn from circulation and cancelled, sent *M* the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying *M* in respect of the notes. The form was filled up and signed by *M* and returned by him to the Currency Office.

Held, that, although there was no intention on the part of Currency Office to pay the amount of the notes, *M* was guilty of an attempt to cheat.

THIS was an appeal from an order of acquittal passed on the 7th September 1888 by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta. Umesh Chunder Mitter was charged under s. 511 of the Penal Code with having, in the month of May 1888, at the Government Currency Office in Calcutta, attempted to cheat the Assistant Comptroller General, in behalf of the Government of India in charge of the Paper Currency Department, by attempting to deceive him, and thereby fraudulently and dishonestly induce him to deliver to him (the said Umesh Chunder Mitter) the sum of Rs. 40, the value of two Government currency notes, Nos. $\frac{A}{73}$ 21687 and $\frac{A}{74}$ 61346 for Rs. 20 each, and Hem Chunder Chatterjee and two others were charged under s. 116 of the Penal Code with having at or about the time and place aforesaid aided and abetted the said

* Criminal Appeal No. 3 of 1888, against the order of acquittal passed by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 7th of September 1888.

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Umesh Chunder Mitter in the commission of the offence of cheating.

After the examination of one witness on behalf of the defence the Magistrate stopped the case and acquitted the prisoners.

The Crown appealed to the High Court.

The facts of the case are fully stated in the judgment of the High Court.

The *Advocate-General* (Sir *G. C. Paul*) and Mr. *Roberts* for the Government of Bengal.

Mr. *Palit* for Umesh Chunder Mitter.

Mr. *M. Ghose* for Hem Chunder Chatterjee and Haran Chunder Chatterjee.

Mr. *Allen* for Jadub Chunder Gangooly.

The judgment of the Court (MACPHERSON and TREVELYAN, JJ.) was as follows:—

This is an appeal from an acquittal. The first accused was charged with attempting to cheat. The other prisoners were charged with aiding and abetting him in the commission of the offence of cheating.

After one witness had been examined for the defence, the Magistrate stopped the case and acquitted the prisoners.

When we first heard this appeal the Advocate-General appeared for the Crown. At the conclusion of his opening address we held that there was no case against Haran Chunder Chatterjee, and accordingly we discharged him. We then heard Counsel for the other accused and the Advocate-General in reply. After consideration we discharged the accused Jadub Chunder Gangooly, and expressed our opinion that the Magistrate ought not to have stopped the case for the defence so far as the remaining two accused were concerned. We gave them an opportunity of calling evidence before us. We have since heard such evidence as has been produced on behalf of the accused Umesh Chunder Mitter and Hem Chunder Chatterjee, and must now deal with the case as completed.

Although we are told that in dismissing the case the Magistrate made some statement, he did not record his reasons for

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acquitting, and therefore we have not the advantage of knowing the nature of, or the grounds for, his opinion.

There is no serious difficulty about the facts of this case. The chief questions depend upon the effect to be given to those facts, and the inferences to be derived from them.

It is contended that the facts proved do not disclose an offence, and therefore it is desirable to see what are the undoubted facts of this case.

On the 23rd of May last the principal accused Umesh Chunder Mitter sent in to the Currency Office a letter (Exhibit A), enclosing two half currency notes for Rs. 20 each, stating that the other halves were lost from his box where he kept them, and asking what steps should be taken for the recovery of the money.

On receipt of this letter, Mr. Keene, the Assistant Comptroller-General in charge of the Currency Office, caused a search to be made in the Registration Branch of his office to see if there was any other claim against the two notes. On such search it was found that the amount of the notes had been paid to the holder of the other halves.

Mr. Keene then caused a document, which is marked Exhibit D, to be sent to Umesh Chunder Mitter. This was sent on the 28th of May, with a covering letter which treated Umesh Chunder's letter as an application for the payment of the value of the notes, and requested him to answer the questions embodied in the claim.

D is a form of claim with questions to be answered by the claimant.

As to his sending this form Mr. Keene states: "My object in sending out D was, believing these men were attempting to cheat, I wanted them to commit themselves." It is clear that when he sent out D, Mr. Keene did not contemplate paying Umesh Chunder Mitter in respect of the notes. Within Mr. Keene's experience no notes had been paid a second time, and, as he says, it ought not to happen that they are paid a second time. He was examined as to what he would do, in case, after payment to one applicant, a second applicant were to make out his title, but as such an event had not happened within his experience his answer is purely hypothetical.

The questions contained in this form of claim were filled in, signed by Umesh Chunder Mitter, and returned to the Currency Office on the 11th of June. This document, as filled up, is in form and intent an application for the payment of the money.

In answer to the questions contained in this form, Umesh Chunder Mitter stated that he was proprietor of the entire notes, that he received them from Haran Chunder Chatterjee of Gobardangah about October 1887, that he himself divided them in halves for the purpose of forwarding them to his cousin, that in December 1887 he lost the halves from his box, and that the persons who could give evidence as to his possession of the entire notes or as to the circumstances of the loss were Hem Chunder Chatterjee and Jadub Chunder Gangooly.

The Currency Office had paid in respect of the other halves in 1871. On the 17th of November 1871, those half notes were withdrawn from circulation, and on the 18th of the same month they were cancelled. It follows from this that the statement made by Umesh Chunder that he received the entire notes from Haran Chunder Chatterjee in October 1887 and divided them himself is untrue. On the 13th of June another printed form is sent to Umesh Chunder Mitter. It asks for a certificate from the party from whom the claimant received the whole notes, of his having paid the notes to the claimant, and also for a declaration of the persons named in the form Exhibt D, setting forth what they know as to the whole notes having been the property of the claimant and in his possession, and also as to the subsequent loss of the half notes in question. In answer to this letter Umesh Chunder Mitter sends in the certificate and declaration asked for.

The certificate purports to be signed by Haran Chunder Chatterjee and is as follows:—

"I do hereby certify that about seven or eight months ago I have sent two full notes of Rs. 20 each to Baboo Umesh Chunder Mitter of Areadah, the numbers of which are stated below $\frac{A}{73}$ 21687 for Rs. (20) twenty, $\frac{A}{74}$ 61346 for Rs. (20) twenty.

GOBARDANGAH:
The 28th June 1888. } HARAN CHUNDER CHATTERJEE."

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These numbers correspond with the numbers of the half notes sent in with the first letter. The statements in this certificate were unquestionably untrue to the knowledge of Umesh Chunder Mitter.

The declaration was written out by the accused Hem Chunder Chatterjee and was signed by him and the accused Jadub Chunder Gangooly, and was as follows :—

"We declare to the best of our knowledge that two full notes *viz.*, $\frac{A}{73}$ 21637 and $\frac{A}{74}$ 61346 of rupees twenty each were handed over to Baboo Umesh Chunder Mitter of Areadah about eight months ago when we were present there.

AREADAH: *The 2nd July*, 1888. } HEM CHUNDER CHATTERJEE. JADUB CHUNDER GANGOOLY."

The statements in this declaration were unquestionably untrue to the knowledge of Umesh Chunder Mitter and Hem Chunder Chatterjee.

On the 10th of July, Mr. Keene wrote to Umesh Chunder Mitter, asking him to come and see him at the Paper Currency Office on the 12th of that month at 1 P.M. He came at the appointed time. Mr. Hume, the Government Prosecutor, then questioned him. He was asked if the answers in D were true. He said they were. He was asked if he filled in the answers personally. He said no, but by his nephew Jagadish Chunder Gangooly. He further said that the answers were filled in under his orders, and in his presence at his dictation, and signed by the witnesses named in the form, which was also signed by himself. He was then specially asked about answer No. 2. He said: "Yes I am the proprietor of the entire notes, and I received them from Haran Chunder Chatterjee of Gobardangah in October 1887." Mr. Hume then asked Umesh if he had cut the notes in half. He said: "I think I must have, but am not sure. I have had many notes." Mr. Hume then showed him the certificate and declaration. He said that he knew them, and had received the certificate from Haran Chunder Chatterjee, and the declaration from Hem Chunder Chatterjee and Jadub Chunder Gangooly, and that he had sent the certificate and declaration to the Currency Office through Jadub Chunder

Gangooly. Mr. Hume then said to him: "Baboo, would you be surprised to hear that the other halves of the notes mentioned in your application were cancelled in the Currency Office in November 1871?" He said nothing then, but began to tremble. Mr. Hume said: "Baboo you are in a great mess. This is an attempt to cheat." He said: "I did not intend to cheat." Mr. Hume said: "You must explain that before a Magistrate." Mr. Hume said: "Why did you tell a lie in your application?" He said: "I did wrong sir." Mr. Hume then went with him into Mr. Keene's room, and in Mr. Keene's presence said: "Baboo, can you explain this matter?" He said: "I am a poor man. I have no money. I received the half notes from Haran Chunder Chatterjee, who told me to try and get the money from the Currency Office." There the interview ended.

On the next day warrants were issued; when arrested Hem Chunder Chatterjee produced a Bengali letter to which we shall hereafter refer.

This is the case for the prosecution.

There was no evidence against Haran Chunder Chatterjee, and the only evidence against Jadub Chunder Gangooly was that he had signed the certificate to which we have referred. His defence was that he signed that document without reading it and at the request of Umesh Chunder Mitter. It appears that he has always borne a good character, and although it rarely happens that a man signs a short document of this description without reading it, it is possible that his story may be true, and therefore we thought we could discharge him. As far as the remaining two accused are concerned, their defence is identical. We have heard a most elaborate argument, consisting of two main contentions. In the first place it is said that the acts committed at the most amount to a preparation to commit an offence, and in the second place it is said that it was the duty of the prosecution to show that the defendants in what they did acted dishonestly and that that has not been proved.

We do not think there can be any doubt that, apart from the second question to which we shall presently refer, the facts here amount to an attempt and not merely to preparation. The letter written on the 23rd of May is merely a letter of enquiry,

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and does not amount to an attempt. It is only a step in the preparation for the attempt. In sending it the writer did not commit himself. The document D, however, is an application for the payment of the money, and is the usual form in which such applications are made. An application for money is surely an attempt to obtain money. The application for money under a false pretence, as a rule, concludes the acts of the offender; unless anything occurs to prevent the payment he gets the money. Whether he gets the money or not does not necessarily depend upon any future act of his.

If authority were necessary for this proposition, the case cited to us of *Reg* v. *Hensler* (1) is only distinguishable by the circumstance that this particular question was not argued in that case. But that case, we think, disposes of another branch of the same contention raised by the respondents. It is said that because Mr. Keene, before the application was made to him, knew that the other halves were in the Currency Office, and knew that the matters stated by the applicant were untrue, and would not have paid the money to the applicant, the offence of cheating could not have been committed, and therefore the attempt to cheat could not have been committed. What Mr. Keene says only shows that the offence of cheating could not have been committed. A man may attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated. The case we have cited is on this question undistinguishable from the present case.

There the prisoner was indicted for attempting to obtain money by false pretences in a begging letter. When he paid the money, and apparently when he received the letter, the prosecutor knew its contents to be untrue. In his judgment the Chief Baron says: "This is an attempt by the prisoner to obtain money by false pretences which might have been so obtained. The money was not so obtained, because the prosecutor remembered something which had been told him previously. In my opinion, as soon as ever the letter was put into the post, the offence was committed." In the present case the money was withheld because of the information which Mr. Keene obtained in his office.

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Mr. Gay, who is Mr. Keene's official superior, says that if the claim, the declaration and the certificate had come to him he would, in the ordinary course, have ordered payment.

In *Reg* v. *Hensler* (1), as in the present case, counsel for the prisoner argued that, as the statutable offence could not have been committed, the prisoner could not be convicted of attempting to commit it. This argument was answered by two of the Judges in the following words: "*Blackburn, J.*—You may attempt to steal from a man who is too strong to prevent you. *Mellor, J.*—Or an attempt may be made to steal a watch that is too strongly fastened by a guard. Here the prosecutor had the money, and was capable of being deceived, and the prisoner attempted to deceive him."

One more point was raised on this question of attempt. It appears from Mr. Gay's evidence that before money is paid on a currency note it is usual to take a bond of indemnity from the claimant.

It is argued that in this case the attempt was not completed because the bond was not signed. We do not think there is anything in this argument. The application for the money is, we think, the attempt, or at any rate sufficient to constitute an attempt. The execution of the bond of indemnity is not a portion of the application. It is a precaution taken by the person sought to be cheated, and is an act which would ordinarily take place before the offence of cheating could be completed. As far as the applicant is concerned he would be willing to take the money without the indemnity. His offence is making the false pretence and asking for the money.

It seems to us that the execution of the bond of indemnity is not an act of the accused forming any portion of the acts which constitute the commission of the offence. The offence would be just as complete whether an indemnity was or was not insisted upon. The Currency Office authorities may, if they like, dispense with the indemnity. The object of the bond is to secure the re-payment of the money if it has been wrongly paid. The object of it is not to prevent the payment, but

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to indemnify the Government in case any one else claims the money. We have carefully examined the English cases cited by Counsel for the accused, and we do not think that they have any application to the present case. We think it quite clear that an attempt was made.

Before considering the second question it will be desirable to examine the evidence for the defence. It is unquestionably untrue that the whole notes ever belonged to Umesh Chunder Mitter, or that they ever came into his hands. This is the case both for the prosecution and for the defence. According to the evidence for the defence, it is untrue that the halves ever came from the hands of Haran Chunder Chatterjee into his hands. The defence trace the half notes back. They call in the first place a lady named Din Tarini Dabee, who is said to have had them in her possession.

Almost at the beginning of her examination-in-chief, the Counsel examining this lady plied her with leading questions and other questions of a nature only allowable in cross-examination. There seems to us to have been no excuse whatever for this course, and the result is that, so far as her examination-in-chief is concerned, it is difficult to use it at all as evidence on behalf of the defendant calling her, though it may be used as evidence against him. It is, however, clear from the other evidence that these half notes, which were afterwards sent to the Currency Office, came from this lady. She says that she found them in her box about a year and a half ago, and we do not think that there is any doubt that she gave them to her niece, the wife of the defendant, Hem Chunder Chatterjee.

There is some conflict of testimony between the aunt and the niece as to what took place when the half notes were handed over. The aunt says: "One day we were seated together, and I told my niece that there was some *goolmal* in respect of the numbers of a 20-rupee note. She asked me if I had shown this note to any one. I said yes, I showed it to a person who had called a few days previously to receive money. My niece said if you give the note to me I will show it to my husband. Five or six days later, when my niece came home, she took the note away from me; nothing further took place."

"One day I met her in Calcutta. She spoke to me about this note and asked me whence I got the note. I said I did not remember, but I believed I got it in the course of my money-lending business."

She is then asked in examination-in-chief some questions, most of which are objectionable in form. They are as follows :—

"' Q. What else did your niece say to you or you to her ?

A. Nothing.

Q. Did you want to get money on these pieces of note ?

A. No mention was made about obtaining money.

Q. Did you wish to get the money ?

A. If the note was cashed, and the money paid to me, I would have taken it.

Q. By whom was the note to be cashed ?

A. I gave no direction to my niece as to by whom the note was to be cashed. I made the note over to her that she might show it to her husband.

Q. Why did you want the note to be shown ?

A. Because my niece said 'give it to me and I will show it to my husband.'

Q. But what did you understand by your niece's wanting to show the note to her husband ?

A. I understood that it was taken to be shown to her husband.

Q. For what purpose ?

A. Because he is a man of education, and knows how to read and write. I have a sircar in the house, he can read and write Bengali."

The niece has been called before us and she now says :—

"When she gave me the notes she said 'these notes have been lying with me; I don't know for how long, and I don't know what has become of the other halves of the notes.' She said 'give these notes to your husband, and ask him to change these notes and send me Rs. 40.' "

Of these two statements we have no hesitation in preferring that given by the aunt. The husband of the niece is one of the accused, and she is therefore much interested. The aunt's story was told at the time when the details of the events must have

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been fairly fresh in her memory, and it is pretty clear that her story is substantially accurate.

On getting the notes the niece says that she handed them to her husband saying: "Your aunt-in-law has asked me to hand over to you these two notes; you change them and send her 40 rupees. Her husband addressing Umesh Chunder Mitter, who was then present, said: "I have hardly any leisure to go out of my office. Will you change these notes and send the money to me at my house?" The application seems then to have been made.

It does not appear that the aunt ever said that she had had the corresponding halves in her possession. The niece does not say that she or her husband told Umesh Chunder Mitter that Din Tarini had ever had the whole notes in her possession, or indeed said anything about the whole notes.

In spite of this, Umesh Chunder Mitter, in the letter which he first wrote, said that the other halves were lost from his box where he kept them. This was untrue, as far as he was concerned, and as far as Din Tarini was concerned, it does not appear whether it was true or not. He was apparently aware that he could not recover the money unless he satisfactorily accounted for the loss of the other halves of the notes. It was for this reason that he invented this falsehood.

The inference from this falsehood is that Umesh Chunder Mitter knew that Din Tarini had never had the other halves. If he had known, or learnt of it, there is no real reason why he should not have told the truth. The form D is then sent to Umesh Chunder Mitter, and then occurs an incident which has been much relied upon by the defence. It is said that a letter was written to which the Bengali letter, produced by Hem Chunder, was an answer. The Bengali letter produced appears to have been written in the name of the aunt to her niece in answer to a letter addressed to Din Tarini, and therefore, although the evidence of the sending and of the contents of such letter is of a most suspicious character, we do not think we ought to repudiate such letter, and we accept the story as true.

The witness who speaks to it refers to the contents as follows:—

"The writer of the letter was enquiring in reference to the notes which had been given to her as to how long they were

with the person who sent it, and where he or she got it from. I don't remember anything more than this."

In answer to this letter, the following letter was written at Din Tarini's request to her niece :—

"I have received the particulars of your letter. The note (or notes) about which you wrote to me, that note (or those notes) I received in the course of my money-lending business. Who gave it (or them) I don't know. It has (or they have) been with me for many days, that I know."

After the receipt of this letter D was filled up and sent to the Currency Office. There is nothing in the letter which gives the smallest colour for the false statements in the claim, in the certificate and in the declaration. This is the whole of the evidence. It is noticeable that Din Tarini never claimed to have possessed the other halves, and that no one ever told either Hem Chunder Chatterjee or Umesh Chunder Mitter that she possessed them. On the contrary the falsehood of their statements shows that these persons were aware that Din Tarini never possessed the other halves, and it was necessary for them to tell these untruths in order to account for the other halves.

On this state of facts it was contended that no case has been made out. It was said that, although the false pretence was made out, it was necessary for the prosecution to show that the attempt had been made dishonestly. There is, we think, no doubt that the prosecution must show that the act was done dishonestly. "Dishonestly" is defined in the Penal Code as follows :—

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly."

The definitions of "wrongful loss" and "wrongful gain" show that what the prosecution has to prove is that the Government was as against the applicant legally entitled to the 40 rupees, or that the applicant was not entitled. Unquestionably the means used by the applicant were unlawful within the meaning of the Penal Code. If the applicant had any real reason to suppose that he or the person for whom he was acting was legally entitled to the rupees 40, he would not have committed the offence charged. We do not think there can be any doubt that Government is

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entitled to retain the 40 rupees, that is to say is entitled in law to the money until it is claimed by a person who has been the holder of the full notes. They are not obliged to pay the money to the holder of the half notes except as being the person entitled to the whole notes. It was contended that the prosecution should show that somebody, other than Din Tarini, was the owner of the full notes. This argument might possibly apply if "dishonestly" only included "wrongful gain," but it includes in the alternative "wrongful loss." Government being entitled to retain the money, in the absence of proof of ownership of the full notes, the definition of "wrongful loss," and consequently the definition of "dishonestly," is here satisfied. In this case the statement that the applicant owned the whole notes is unqestionably false, and false to his knowledge.

The accused have both borne a good character for some time. If they were to profit at all by the offence—and of this there is some doubt—the profit would have been small as far as these notes were concerned. Both these are circumstances which, in criminal cases, have occasionally great weight, but neither of them can dispose of clear and undisputed facts. So far as the evidence of good character is concerned the false statements seem to us to dissipate at once the effect of that evidence, except so far as the question of punishment is concerned. A man who has to his credit an unblemished character may, of course, claim that it be considered on the question of punishment. It is sad to see men who have by honest work earned the respect of their employers, and of those associated with them, inconsiderately bringing themselves within the grasp of the Criminal law, but the record of many of such cases is to be found in Criminal Courts. We do not think that there is any real distinction between the cases of the two accused. Hem Chunder Chatterjee wrote out the certificate, and there is reason to suppose that he induced Umesh Chunder Mitter to make the application.

There is one more contention with which we must deal: It is argued that we ought not in an appeal lightly to set aside the order of the Magistrate. We agree with this contention. We do not think we ought to interfere unless we are fully satisfied from the evidence that the crime has been proved, and are also

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satisfied that the Magistrate had no reasonable ground for acquitting the prisoners.

Assuming that the reasons which actuated the Magistrate in discharging the prisoners coincide with the arguments which have been addressed to us by Counsel for the respondents, we think that the Magistrate had no reasonable ground for acquitting the prisoners, and that the crime was fully proved. We convict the accused Umesh Chunder Mitter under ss. 420 and 511, Indian Penal Code, and convict Hem Chunder Chatterjee of abetting the offence committed by Umesh Chunder Mitter.

As to sentence, we think that, considering all the circumstances of the case, and especially the good character which the accused have heretofore borne, the ends of justice will be satisfied by the infliction of a fine. We sentence each of the accused to pay a fine of Rs. 200; in default to suffer simple imprisonment for the period of two months.

C. D. P. *Order of acquittal set aside.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

ABDUL WAHED AND OTHERS (DECREE-HOLDERS) *v.* FAREEDOONNISSA (JUDGMENT-DEBTOR).*

1889 *March* 1.

Execution of decree—Security for Costs—Security Bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), *s.* 549—*Act VII of* 1888, *s.* 46—*General Clauses Act (I of* 1868), *s.* 6.

On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force: *Held*, on appeal, that the application should have been allowed.

* Appeal from Order No. 468 of 1888, against the order of Baboo Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 24th of November 1888.